Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE

Supreme Court of the United States

October Term, 1960

No. .....

THE PHILIP CAREY MANUFACTURING COMPANY, LLOYD A. FRY ROOFING COMPANY, and THE RUBEROID CO.,

Petitioners,

—v.—

HONORABLE ROBERT L. TAYLOR, JUDGE OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit (Cecil, Weick and O'Sullivan, Circuit Judges) entered January 31, 1961, dismissing petitioners' petitions to that court for writs of mandamus and prohibition. The petitions dismissed were for writs commanding respondent to vacate the order of the United States District Court for the Eastern District of Tennessee entered by him October 6, 1960, in the action entitled *Leopard Roofing Company, Inc.* v. *Asphalt Roofing Industry Bureau, et al.* transferring said action to the United States District

Court for the Southern District of Mississippi, and prohibiting such transfer.

Citation to Opinion Below

The opinion of the Court of Appeals is reported at 286 F. 2d 782, and is printed in the Appendix hereto.

Jurisdiction

The opinion of the Court of Appeals was filed and judgment entered on January 31, 1961 (pp. A-1, A-8, *infra*). On February 16, 1961 and March 22, 1961, respectively, the Court issued orders enjoining respondent from transferring the aforesaid *Leopard* action to Mississippi, and continuing such injunction, pending petitioners' application to this Court for certiorari and this Court's final disposition thereof (pp. A-9, A-10).

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented for Review

1. Does 28 U. S. C. §1404(a) empower a District Court to transfer a civil action to another district where it could not have been properly brought against some of the defendants, if the action was not properly brought against those defendants in the transferor district and they have not been served or appeared?

2. Where a District Court lacks personal jurisdiction over some of the defendants in a civil action, does 28 U. S. C. §1404(a) empower the court to transfer such action to another district?

The foregoing questions are succinctly presented by the following excerpts from the opinion of the Court of Appeals:

> "The transferee court must have been an alternative forum wherein the action could have been brought in the first instance. * * * It is conceded that none of the individual defendants could have been sued in the transferee court. They were not residents of either the transferor or transferee state. * * *
>
> "It seems that it is implicit in the consideration of a case for transfer that it be properly brought in the transferor court.
>
> "It is obvious that the action was not properly brought against the individuals in Tennessee and it is equally obvious that it could not have been properly brought against them in Mississippi. We conclude that Judge Taylor was correct in assuming that the individual defendants were not before the court. The fact that their names were listed as defendants on the complaint gave them no status as parties which should bar a transfer of the action." (pp. A-4, 5, *infra*)

Statutes Involved

28 U. S. C. §1404(a), 62 Stat. 937:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Clayton Act, §4, 15 U. S. C. §15, 38 Stat. 731:

> "Sec. 4. That any person who shall be injured in his business or property by reason of anything for-

bidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides, or is found, or has an agent, * * *"

Clayton Act, §16, 15 U. S. C. §26, 38 Stat. 737:

"Sec. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, as against threatened loss or damage by a violation of the antitrust laws, * * *"

Statement of the Case

The jurisdiction of the Court of Appeals was invoked under 28 U. S. C. §1651.

On February 4, 1960, Leopard Roofing Company Inc. filed a complaint in the United States District Court for the Eastern District of Tennessee, Northern Division, against 13 corporations, one trade association and 73 individuals, charging violation of certain of the antitrust laws and asking treble damages (Clayton Act, §4) and injunctive relief (Clayton Act, §16). Rec. pp. 9-65. After an amended complaint and certain dismissals 12 corporate and 72 individual defendants remained.

None of the individual defendants has been served with process, none of them resides in the Eastern District of Tennessee, and none of them has appeared. The original and amended complaints were served upon the defendant corporations, and for the purposes hereof it is conceded that each of said corporations transacts business in the Eastern District of Tennessee and also in the Southern District of Mississippi (Clayton Act, §12).

On August 7, 1960, plaintiff moved to transfer the action to the Southern District of Mississippi, Jackson Division, pursuant to 28 U. S. C. §1404(a) (Rec. p. 66). No evidence was offered in support of said motion that any of the 72 individual defendants resided in the Southern District of Mississippi or could be found there. Respondent concedes, and the Court of Appeals has found, that "[the action] could not have been properly brought against them in Mississippi" (p. A-5, *infra*).

On October 6, 1960, respondent entered an order "pursuant to 28 U. S. C. §1404(a)" transferring said action to the District Court for the Southern District of Mississippi, Eastern Division. Said order and respondent's memorandum of the same date stating the grounds upon which said order was issued are printed in the Appendix hereto (pp. A-11, A-12, *infra*).

Within ten days thereafter six corporate defendants (including two of these petitioners) moved respondent to amend the order of transfer by adding thereto a certification pursuant to 28 U. S. C. §1292(b) (Rec. p. 129). This motion was denied (Rec. p. 130). Thereafter petitioners petitioned the Court of Appeals for writs of mandamus and prohibition.

Reasons for Granting the Writ

A. The decision below is in direct conflict with the decision of this Court in *Hoffman* v. *Blaski*, 363 U. S. 335 (1960).

If the decision below is allowed to stand it will return the question of the proper interpretation and application of §1404(a) to much the same state of uncertainty and confusion which existed prior to the decision of *Hoffman* v. *Blaski* by this Court in 1960 and which that decision

was intended to and should have dispelled. In his concurring opinion Mr. Justice Stewart stated:

> "From the point of view of efficient judicial administration the resulting history of this litigation is no subject for applause. • • • In any event, the conflict between the Circuits is now resolved, and what happened here will not happen again." (363 U. S. at page 345)

It has happened again.

This Court held in *Hoffman* v. *Blaski* that "the power of a District Court under §1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff." And the court stated that it agreed with the Seventh Circuit that:

> "'If when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district "where [the action] might have been brought." If he does not have that right, independently of the wishes of defendant, it is not a district "where it might have been brought," • • •'" (363 U. S. at page 344).

Here the Court of Appeals has expressly found that the Southern District of Mississippi was not a district where the plaintiff had the right to sue the 72 individual defendants independently of their wishes; yet the Court of Appeals has upheld the transfer to that district.

The Court of Appeals has misconstrued and limited *Hoffman* v. *Blaski* by attempting to carve out an exception to this Court's clear definition of the words "where it might

have been brought" in §1404(a). The court below has construed *Hoffman* v. *Blaski* as inapplicable where the action was not properly brought against some of the defendants in the transferor district and where those defendants have not been served or appeared, provided the action was properly brought against the other defendants and the transfer would be valid if they were the only defendants. The court affirmed Judge Taylor's conclusion that defendants over whom the District Court has not acquired personal jurisdiction may be disregarded as parties, and that it is immaterial whether the action might have been brought against them in the transferee district. No such exception is contained in, or may be implied from, this Court's decision in *Hoffman* v. *Blaski*.

The effect of the decision below is that if a plaintiff sues ten defendants and obtains service on one of them, §1404(a) empowers the District Court to transfer the *action* to another district where it might have been brought against the single defendant served, upon the application of either the plaintiff or that defendant, in total disregard of the other defendants and of the Court's lack of jurisdiction over them.

Of course, an action cannot be transferred piecemeal (*Anschell* v. *Sackheim*, 145 F. Supp. 447, D. C. N. J. 1956) and that was not done here. It is the action, not the parties, which may be transferred under §1404(a). If the action as then constituted could not have been properly brought in the transferee district, then that district clearly is not a district where the action "might have been brought" under §1404(a) as construed by this Court.

Apparently the court below recognized that if a single one of the individual defendants had been found and served in the Eastern District of Tennessee the action could not have been transferred to Mississippi. To say that lack of

personal jurisdiction in the transferor court is sufficient to validate a transfer which would be invalid if personal jurisdiction existed is only to compound the error. In *Hoffman* v. *Blaski* this Court, in stating the question presented, referred to the power of "a District Court, in which a civil action has been properly brought," to transfer the action under §1404(a) and noted the concession of the parties that "the statute requires an alternative forum in which plaintiff might proceed,'" citing *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 507. The decision below eliminates the "alternative forum" requirement as to defendants who could not be sued in either forum.

Respondent may point out that on March 1, 1961, after the decision of the Court of Appeals herein, he entered an order in the *Leopard* action dismissing said action against all of the individual defendants; and he may urge that this proceeding is now moot. Obviously the dismissal of the individuals at this time neither lessens the importance nor cures the error of the decision below. Plaintiff should not have the option of joining proper but unnecessary defendants who could not be sued elsewhere and then retaining or dismissing them (whether served or not) to suit his desire for or opposition to a transfer. Nevertheless, the solution can hardly be to ignore the presence of those defendants in disregard of the alternative forum requirements of §1404(a). Here the corporate defendants believed that under *Hoffman* v. *Blaski* they were powerless to obtain a transfer to a more convenient district while the individual defendants were in the case. The record will show that the corporate defendants strenuously opposed the transfer to the Southern District of Mississippi as contrary to the convenience of parties and witnesses (Rec. pp. 72-109).

B. The decision below is in conflict in principle with the decisions of other Courts of Appeals as to the power of a District Court to transfer an action lacking personal jurisdiction over all parties.

The decisions of the Courts of Appeals are in direct conflict as to the power of a District Court under 28 U. S. C. §1406(a) to transfer a civil action to another district when personal jurisdiction over some of the defendants has not been obtained. In very recent decisions dealing directly with this point the Second and Third Circuits have held that a transfer may not be made under §1406(a) where personal jurisdiction is lacking. *Goldlawr Inc.* v. *Heiman*, —— F. 2d ——, CCH 1961 Trade Cases ¶69,951 (2d Cir. Feb. 21, 1961); *Hohensee* v. *News Syndicate Inc.*, 286 F. 2d 527 (3rd Cir. 1961). Two decisions of the District of Columbia Circuit are to the contrary: *Amerio Contact Freezers Inc.* v. *Knowles*, 274 F. 2d 590 (1960); *Hayes* v. *Livermont*, 279 F. 2d 818 (1960).

In these cases the Courts of Appeals have recognized that §1404(a) and §1406(a) are related sections and that the principle involved as to the power of a District Court to make a transfer lacking personal jurisdiction over all parties is the same under both sections. For example, the Second Circuit stated in *Goldlawr* v. *Heiman, supra*:

> "Furthermore, Goldlawr concedes that under section 1404(a), a legislative sibling to section 1406, 'there must be jurisdiction and venue in the transferring district as well as in the district to which the case is transferred.' But if jurisdiction is necessary under section 1404(a) which permits transfer for convenience of parties and witnesses so also should this requirement be met when the transfer is made for improper venue. Although the reason for the transfer is different in the two sections, they are under the same general

> venue heading and there is no indication whatsoever that Congress thought that it was dealing with an entirely different subject in section 1406(a). It was merely providing for a way in which to cure a venue defect." (CCH 1961 Trade Cases at p. 77,783)

And in *Hahensee* v. *News Syndicate Inc., supra* the Third Circuit pointed out:

> "The sole purpose of this section as well as its companion, 28 U. S. C. §1404, was to provide a means for curing a defect in venue whether it be improperly laid or improper because of the inconvenience of the parties. Venue has to do with determining the proper place where litigation may proceed. It has nothing to do with determining the extent of the area in which a party defendant may be properly served." (286 F. 2d at p. 529)

There is a line of District Court cases under §1406(a) holding that that section assumes that venue has been properly laid in the district where the action is filed and that personal jurisdiction has been obtained; that where personal jurisdiction over the defendants, or some of them, is lacking §1404(a) does not authorize transfer even to a district where the action could properly have been brought and where service could be made.

Wilson v. *Kansas City Southern Ry. Co.*, 101 F. Supp. 56 (D. C. Mo. 1951);

Hargrove v. *Louisville & Nashville R.R. Co.*, 153 F. Supp. 681 (D. C. Ky. 1957);

Fistel v. *Beaver Trust Co.*, 94 F. Supp. 974 (S. D. N. Y. 1950);

Goldlawr Inc. v. *Shubert*, 175 F. Supp. 793 (S. D. N. Y. 1959);

McDaniel v. *Drotman*, 103 F. Supp. 643 (D. C. Ky. 1952).

In *Wilson* v. *Kansas City Southern Ry. Co., supra*, the court stated:

> "'In all cases in which the doctrine of *forum non conveniens* comes into play (or a transfer is effected under Section 1404(a), supra), it presupposes at least two forums in which the defendant is amenable to process; the doctrine (and aforesaid statute) furnishes criteria for choice between them.' *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 506, 507, 91 L. Ed. 1055. 'Indeed the doctrine of *forum non conveniens* (or a transfer under 1404(a), supra) can never apply if there is absence of jurisdiction or mistake of venue.' 330 U. S. at page 504." (101 F. Supp. at p. 59)

Here there was both mistake of venue and absence of personal jurisdiction over the individual defendants. Respondent in his memorandum opinion on the motion to transfer concedes that none of the individual defendants have been served with process, that all of them are non-residents of Tennessee, and that "the individual defendants are not before this Court" (Rec. pp. 117-119).

It is submitted that the conflict and confusion which exists among the lower courts as to whether personal jurisdiction over all parties is prerequisite to a valid transfer under either §1404(a) or §1406(a) calls for review of the decision below by this Court.

Respectfully submitted,

ROBERT TAFT, JR.
Attorney for The Philip Carey Manufacturing Company

BURTON Y. WEITZENFELD
Attorney for Lloyd A. Fry Roofing Company

CYRUS AUSTIN

APPENDIX

Opinion of the Court of Appeals

(Filed January 31, 1961)

No. 14396

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE PHILIP CAREY MANUFACTURING COMPANY, *et al.*,

Petitioners,

—v.—

HONORABLE ROBERT L. TAYLOR, Judge of the United States District Court, Eastern District of Tennessee, Northern Division,

Respondent.

ON PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

Decided January 31, 1961

Before: CECIL, WEICK and O'SULLIVAN, Circuit Judges.

CECIL, Circuit Judge. The Philip Carey Manufacturing Company, Lloyd A. Fry Roofing Company, The Ruberoid Company and Allied Chemical Corporation being four of the defendants in a private anti-trust suit, viz., Leopard Roofing Company, Inc. v. Asphalt Roofing Industry Bureau et al., filed in the United States District Court for the Eastern District of Tennessee, petition this Court for writs of mandamus and prohibition.

The petitioners seek writs directing Judge Taylor, District Judge of the District Court for the Eastern District of Tennessee, to vacate an order entered by him on October 6, 1960, transferring the civil anti-trust action, above mentioned, to the District Court for the Southern District of Mississippi and to prohibit such transfer.

Leopard Roofing Company, Inc. commenced its action in the District Court in Tennessee by filing a complaint on February 4, 1960. Under order of the court an amended complaint was filed March 21, 1960. In this amended complaint fourteen corporations, one trade association organized under the laws of New York and 73 individuals were named as defendants.

The Asphalt Roofing Industry Bureau, the defendant trade association, moved for dismissal for want of jurisdiction on the ground that it is an unincorporated association, under the laws of New York, and did not do business in Tennessee. The court set this motion for hearing on October 12th. On October 4th the plaintiff filed a notice of dismissal of the action as to this defendant and G. S. Bryant, its executive secretary. Prior to filing the mandamus petition, two of the corporate defendants, Johns-Manville Corporation and The Lehon Company were dismissed from the action. On October 6th, the district judge ordered a transfer to the Southern District of Mississippi, under Section 1404(a) of Title 28, U.S.C.

The suggestion of transfer was first made by Judge Taylor in his order of May 26th, assigning the case for a pretrial conference on August 11, 1960. On August 7th, four days before the date for the conference, counsel for plaintiff moved for a transfer to the Southern District of Mississippi. Objections to transfer were made by some of the defendants and the matter was heard by the court on affidavits of the parties and oral arguments of counsel.

At the time the petition was filed in this Court there were twelve corporate and 72 individual defendants. The individuals were officers and employees of the corporations. None of the individuals was served with summons in the Eastern District of Tennessee and it is conceded that none could be legally served there unless he or they voluntarily came into the district. Subsequent to the filing of the petition in this Court, the plaintiff gave notice of the voluntary dismissal of the action as to all of the individual defendants.

In this posture of the case, is it subject to transfer to another district under Section 1404(a) Title 28, U. S. C.? That section provides "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The question is properly presented in this Court by petition for writs of mandamus and prohibition. *Hoffman* v. *Blaski*, 363 U. S. 335; *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249; *Ex parte Peru*, 318 U. S. 578; *Johnson & Johnson* v. *Picard*, 282 F. 2d 386, C. A. 6.

District Judge Taylor found, in an opinion filed October 6th "It is further of the opinion that, in the interest of justice, plaintiff's motion to transfer should be sustained and the case transferred from Knoxville to Meridian, Mississippi." This is a matter that is largely discretionary with the District Judge. *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 32; *Nicol* v. *Koscinski*, 188 F. 2d 537, C. A. 6; *L. C. Fuller, Jr., Lumber Co., Inc.* v. *Anglin*, 244 F. 2d 72, C. A. 6, cert. denied 355 U. S. 821. We find no abuse of discretion on the part of Judge Taylor in making the transfer. The right to a transfer under the statute is available to a plaintiff as well as a defendant. A plaintiff is not bound by his choice of forums, if he later discovers that there are good reasons for transfer. A judge in his discretion may take

this into consideration in determining if a transfer should be granted. *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949, C. A. 2; *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777, C. A. 9; 1 Moore's Federal Practice 1766, Sec. .145 (4.-2).

The sole question involved here is whether this action could have been brought in the first instance in the Mississippi district.

It is conceded that the corporate defendants were properly sued in the Tennessee district and that the action could have properly been brought against them in the Southern District of Mississippi. Sec. 22, Title 15, U. S. C.

Because of a number of conflicting opinions in the various circuits on the interpretation of the statute now under consideration, the Supreme Court granted certiorari in the *Blaski* case, supra. The purpose and meaning of the statute was clarified to a considerable extent. Specifically it was there held that a defendant could not confer jurisdiction on a transferee court by consent. The transferee court must have been an alternative forum wherein the action could have been brought in the first instance.

Notwithstanding the clear statements of the Court in the opinion in the *Blaski* case, in deciding the issue before it, it does not reach the problem presented by the seventy-two individual defendants in the case at bar. We find no authority directly in point on the question at issue.

Judge Taylor, in his opinion, said: "Since the individual defendants are not before this Court, the question whether they could have been sued in Mississippi is no longer pertinent to the consideration of the motion to transfer." The petitioners claim that because the action could not have been brought against the individuals in Mississippi, in the first instance, it cannot be transferred. It is conceded that none of the individual defendants could have been sued in the transferee court. They were not residents of either the transferor or transferee state. The record indicates that

they were apparently made defendants under the mistaken belief that they could be served, as corporations are, under Section 22, Title 15, U. S. C.

In *Ex parte Collett*, 337 U. S. 55, 60, the Court said: "Section 6 of the Liability Act (F.E.L.A.) defines the proper forum; section 1404 (a) of the Code deals with the right to transfer an action *properly* brought." (Emphasis added.)

In *Continental Grain Co.* v. *Barge FBL-585 et al.*, 364 U. S. 19, 21, the Court said: "Two weeks ago this Court decided in *Hoffman* v. *Blaski* . . . that this language bars transfer of a 'civil action' *properly* pending in one District Court to another in which that 'civil action' could not have been brought because the defendant could not have been subjected to suit there at the time when the case was originally filed." (Emphasis added.) It seems that it is implicit in the consideration of a case for transfer that it be properly brought in the transferor court.

It is obvious that the action was not properly brought against the individuals in Tennessee and it is equally obvious that it could not have been properly brought against them in Mississippi. We conclude that Judge Taylor was correct in assuming that the individual defendants were not before the court. The fact that their names were listed as defendants on the complaint gave them no status as parties which should bar a transfer of the action.

To permit the transfer under the circumstances of this case is in accord with reason and justice.

We are asked to declare as a permanent rule of construction that one improperly joined as a defendant, one against whom a suit cannot be brought in the court of origin, can defeat a transfer, otherwise legal and proper. Such a technical and narrow construction, if adopted as a

rigid rule, might be used to defeat the purpose of the statute, to allow transfers in the interest of justice.

Counsel for the plaintiff in the District Court action claims that since the individual defendants have been dismissed, the question has become moot and that there is now no bar to a transfer.

These defendants were dismissed by a notice of counsel for the plaintiff presumably intended to be in accordance with Rule 41(a)(1)(i) of F. R. C. P. The text of the notice is "Comes plaintiff, Leopard Roofing Company, and it appearing that the following individual defendants have not been served with process, hereby gives notice of its voluntary dismissal of this action as to the following defendants: . . ."

The rule above referred to reads ". . . an *action* may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, . . ." (Emphasis added.) It was said in *Harvey Aluminum, Inc. et al.* v. *American Cyanamid Co. et al.*, 203 F. 2d 105, 106, C. A. 2, cert. denied, 345 U. S. 964: "However, Rule 41(a)(1) provides for the voluntary dismissal of an 'action' not a 'claim'; the word 'action' as used in the Rules denotes the entire controversy, whereas 'claim' refers to what has traditionally been termed 'cause of action.' Rule 21 provides that 'Parties may be dropped or added by order of the court on motion . . .' and we think that this rule is the one under which any action to eliminate Reynolds as a party should be taken." (See also: *Weaver* v. *Marcus*, 165 F. 2d 862, C. A. 4; 2 Barron and Holtzoff, Federal Practice and Procedure, Sec. 911.)

We find no order of the court dismissing the individual defendants and it is questionable whether or not they have been properly dismissed. Furthermore, the authorities in-

dicate that the question of transfer is to be determined on the status of the parties at the time the action is filed. *Hoffman* v. *Blaski*, supra; *Continental Grain Co.* v. *Barge FBL-585 et al.*, supra. We have therefore not based our conclusion on the dismissal of the individual defendants.

The petition for writs of mandamus and prohibition will be dismissed. The order of this Court heretofore issued restraining the District Court from making the transfer is hereby vacated.

Judgment of the Court of Appeals

(Filed January 31, 1961)

No. 14,396

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE PHILIP CAREY MANUFACTURING COMPANY, *et al.*,

Petitioners,

—v.—

HONORABLE ROBERT L. TAYLOR, Judge of the United States District Court, Eastern District of Tennessee, Northern Division,

Respondent.

ORDER

Before:

CECIL, WEICK and O'SULLIVAN,

Circuit Judges.

Pursuant to the opinion this day filed, the petition for writs of mandamus and prohibition are dismissed, and the restraining order heretofore issued by this court is vacated.

Approved for entry:

/s/ LESTER L. CECIL
United States Circuit Judge

Order Reinstating Injunction

(Filed February 16, 1961)

No. 14396

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE PHILIP CAREY MANUFACTURING COMPANY *et al.*,

Petitioners,

—v.—

HONORABLE ROBERT L. TAYLOR, Judge of the United States District Court, Eastern District of Tennessee, Northern Division,

Respondent.

ORDER

Before:

CECIL, WEICK and O'SULLIVAN,

Circuit Judges.

Upon application of the petitioners herein the former order of this Court restraining the respondent from transferring case No. 4012, Leopard Roofing Company, Incorporated v. Asphalt Roofing Industry Bureau et al. from the Northern Division of the Eastern District of Tennessee, to the Southern District of Mississippi, is hereby reinstated and the respondent is hereby restrained from transferring said case pending the petitioners' application for a writ of certiorari to the Supreme Court of the United States. It is so ordered.

/s/ LESTER L. CECIL
Circuit Judge

Order Continuing Injunction

(Filed March 22, 1961)

No. 14396.

UNITED STATES COURT OF APPEALS,

FOR THE SIXTH CIRCUIT

THE PHILIP CAREY MANUFACTURING COMPANY, LLOYD A. FRY ROOFING COMPANY, the RUBEROID COMPANY,

Petitioners.

—v.—

HONORABLE ROBERT L. TAYLOR, Judge of the United States District Court, Eastern District of Tennessee, Northern Division,

Respondent.

ORDER

Before:

CECIL, WEICK and O'SULLIVAN,

Circuit Judges.

It is hereby ordered that the order of this Court dated February 16, 1961, restraining the respondent from transferring case No. 4012, Leopard Roofing Company, Incorporated v. Asphalt Roofing Industry Bureau et al., from the Northern Division of the Eastern District of Tennessee, to the Southern District of Mississippi, shall be in force and effect until the Supreme Court shall have passed upon the Petitioners' petition for a writ of certiorari; and if such writ is granted by the Supreme Court, said order shall continue until final disposition by the Supreme Court.

/s/ LESTER L. CECIL
Circuit Judge

Order Transferring Action

(Filed October 6, 1960)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Civil Action No. 4012

LEOPARD ROOFING COMPANY, INC.

—v.—

ASPHALT ROOFING INDUSTRY BUREAU, *et al.*

ORDER

In accordance with memorandum this day handed down by this Court and pursuant to Section 1404(a) of Title 28 U. S. C., it is hereby ORDERED that this case be, and it hereby is, transferred to the United States District Court for the Southern District of Mississippi, Eastern Division, at Meridian.

Enter:

/s/ ROBERT TAYLOR
United States District Judge

Respondent's Memorandum upon Order Transferring Action

(Filed October 6, 1960)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Civil Action No. 4012

LEOPARD ROOFING COMPANY, INC.,

—v.—

ASPHALT ROOFING INDUSTRY BUREAU, *et al.*

MEMORANDUM

Plaintiff has moved to transfer this case pursuant to Title 28 U. S. C. Sec. 1404(a).[1]

This Court, by memorandum filed September 28, 1960, ruled that the suit could have been brought in Mississippi against all of the corporate defendants, as such defendants were transacting business in that State within the meaning of the above mentioned statute.

The question as to whether defendant Asphalt Roofing Industry Bureau was subject to suit in Mississippi was

[1] "For convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

set for hearing on October 12, 1960. Subsequent to the time the matter was set down for oral hearing, the plaintiff filed a notice of dismissal as to the defendant, Asphalt Roofing Industry Bureau, pursuant to Rule 41(a)(1)i and this defendant is no longer in the case.

In addition to the fourteen named corporate defendants, there are 73 individual defendants who are corporate officers and representatives of the corporate defendants, none of whom have been served with process. The suit as to the defendant, The Lehon Company, has been dismissed.

This is a private anti-trust action under the Sherman Anti-Trust Act and the Clayton Act as amended, and the individuals, all of whom are non-residents, are not subject to service beyond the territorial limits of the State of their residence as Title 15 U. S. C. Sec. 22[2] only applies to corporations.

The defendants are charged with a conspiracy which is alleged to have covered the Southeastern States, and some of the overt acts were allegedly committed in Mississippi. Why a small corporation domiciled in Meridian, Mississippi would sue in a Knoxville Federal Court when the federal courts of Mississippi were available to it is difficult to understand. Plaintiff gives as a reason the pending Volasco case in Knoxville in which Lloyd A. Fry Roofing Company is a defendant. It now recognizes that this is not a sound reason.

The first amended complaint charges that since the Fall of 1955, twelve of the corporate defendants who are engaged in roofing manufacture and have their principal

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[2] "Any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business, and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

offices in New York, Philadelphia, Cincinnati, Boston and Chicago and 64 of their corporate officers; Asphalt Roofing Industry Bureau, an unincorporated industry trade association with offices in New York (no longer in the case); and, Sears, Roebuck and Company, having its principal place of business in Chicago and eight of its corporate officers, have been engaged in an unlawful conspiracy in restraint of trade in an attempt to monopolize interstate trade and commerce in violation of Section 1 and 2 of the Sherman Act.

The first amended complaint also charges a conspiracy to discriminate in price on a territorial basis asserting the undercutting of plaintiff and certain other companies in the Southeastern area of the United States, including, of course, the States of Mississippi and Tennessee, for the purpose of driving plaintiff and two other companies located in Knoxville, Tennessee and one company located in Stephens, Arkansas out of business in violation of Section 2 of the Clayton Act (Title 15 U. S. C. Sec. 13(a)) as amended by the Robinson-Patman Act.

The sole provision in the Judicial Code empowering this Court to transfer the case to Mississippi is the aforementioned Title 28 U. S. C. Sec. 1404(a). This section of the Code has presented many problems to the courts since its passage. The Supreme Court on June 13, 1969 resolved one of the problems in the cases of *Hoffman* v. *Blaski* and *Sullivan* v. *Behimer* which had been the subject of a variety of opinions in the federal courts. The principle declared in those cases is that a federal court cannot transfer a case unless the suit could have been brought in the transferee forum.

The record in this case shows, and this Court has held, that the suit could have been brought against all of the corporate defendants in the Federal Court at Meridian, Mississippi. Since the individual defendants are not be-

fore this Court, the question whether they could have been sued in Mississippi is no longer pertinent to the consideration of the motion to transfer. It might be stated parenthetically that suit could have been brought against the individual defendants both in Mississippi and Tennessee if service of process could have been had upon them.

Brief reference is now made to some rules governing the transfer of cases.

Some of the courts have held that transfer is not available to the plaintiff. *Barnhart* v. *Rogers Producing Co.*, 86 F. Supp. 595 (N. D. Ohio). In the Barnhart case, plaintiff could not have gotten service on the defendant in the transferee forum and the Court felt that the transfer would nullify the service provision of the Judicial Code.

Plaintiff was allowed to transfer the case from the Western District of New York to the Southern District (Northern Division) of California in the case of *McCarley* v. *Foster-Milburn Co.*, 89 F. Supp. 643. The Upper Court in reversing this decision did not question the ruling of the trial judge that 1404(a) is available to a plaintiff, provided the suit could have been brought in the transferee forum. *Foster-Milburn Co.* v. *Knight*, 181 F. 2d. 949.

The wording of the statute itself is not limited to the defendant and if plaintiff chose the wrong forum in the first instance, he should not be deprived of the right to correct his mistake at a later date. See article by Judge Irving R. Kaufman, *Observations on Transfers Under Section 1404(a) of the New Judicial Code*, 10 F. R. D. 595, 603.

The burden of proof is upon the plaintiff to show an adequate basis for a transfer. *Anschell* v. *Sackheim*, 145 F. Supp. 447, 451; *Ferguson* v. *Ford Motor Co.*, 89 F. Supp. 45, 50; *Hampton Theatres* v. *Paramount Film Dist. Corp.*, 90 F. Supp. 645; *Glasfloss Corp.* v. *Owens-Corning Fiberglas Corp.*, 90 F. Supp. 967.

Sec. 1404(a) permits courts to grant transfers "upon a lesser showing of inconvenience" than was required under the doctrine of *forum non conveniens*, but this does not mean that the relevant factors have changed in determining the transfer. *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 32.

A motion to transfer must be seasonably made. *Barnhart* v. *Rogers Producing Co.*, supra.

The parties agree that one of the principal factors to be considered in determining the question of transfer is the relative ability of the litigants to bear the expenses of trial in a given forum. *McCarley* v. *Foster-Milburn Co.*, supra. The relative ability of litigants to bear expenses in any particular forum must be considered in determining what the interest of justice requires. *Keller-Dorian Colorfilm Corp.* v. *Eastman Kodak Co.*, 88 F. Supp. 863, 866; *Cinema Amusements* v. *Loew's, Inc.*, 85 F. Supp. 319, 327.

The criteria to be followed in determining a transfer were set forth by the Supreme Court in the case of *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 508, 509. This was a *forum non conveniens* case.

> "An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive . . . The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex', 'harass', or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue

his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled *at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation* ..." (Emphasis by the Court.)

Defendants estimate that trial time of this case will consume from six to ten weeks and will involve the calling of several hundred witnesses. One of the reasons given by them why the case should not be transferred is that the case of *Volasco Products Company and Volunteer Asphalt Company* v. *Lloyd A. Fry Roofing Company*, Civil Action No. 3525, now pending in this Court, involves the same alleged conspiracy that is involved in the case under consideration. The cases cited by the defendants in support of this theory involved situations where more than one case was pending in a court which involved common questions of law and fact and which were consolidated for trial, thus eliminating multiple trials. No one is bold enough to assert that the case under consideration can be consolidated with the Volasco and Volunteer case as that case is set for trial in this Court for November 14, 1960 and is calculated by one of the parties to last four weeks and by the other party to last ten weeks. Discovery has been going on in that case for approximately two years. If this is a plausible reason for refusing to transfer this case, then each party who claims to have been injured by the alleged conspiracy in any of the territories allegedly covered by the conspiracy could claim that he had a right to have his case tried in this Court. This contention, in the opinion of this Court, is lacking in merit.

Plaintiff describes itself as a "very small, comparatively unknown roofing manufacturer that does not manufacture a complete line". It alleges that it was incorporated in 1956 under the laws of Mississippi, with principal offices at Meridian, Mississippi; that the corporate defendants, except Sears, Roebuck and Company, are "national manufacturers" of roofing products, and that all of these corporations are domiciled in States other than Tennessee. Thus, we have a Mississippi corporation which claims to have been injured in Mississippi and a number of other States by alleged conspirators, all of whom are non-residents of the State of Tennessee.

Plaintiff now realizes that it made a mistake in instituting this action in this Court. Mr. Peyton Ford, in his affidavit filed on August 8, 1960 in support of the motion to transfer states:

> "2. Plaintiff instituted this action in this District because it believed this would be more convenient in that a similar litigation involving the Volunteer and Volasco roofing companies of Knoxville is pending here against the Fry Roofing Company, one of the defendants in this action.
>
> 3. In the preparation for trial Plaintiff has discovered that there are more witnesses in Mississippi than was anticipated who will have to testify. Moreover, the records and books of Plaintiff will also be needed.
>
> 4. As the Court knows, Plaintiff is a Mississippi corporation and all the defendants are incorporated in states other than Tennessee or Mississippi so that Plaintiff has a right to sue them in Mississippi.
>
> 5. The various corporate defendants do business throughout southeastern United States and are subject to the service of process there under Section 22 of Title

15 U. S. C. so that Mississippi is more convenient not only for Plaintiff but also for all the defendants. Plaintiff also believes that Asphalt Roofing, the unincorporated association, defendant, does business in Mississippi.

6. Accordingly, in the interest of justice, for the convenience of parties and witnesses, Plaintiff respectfully requests that the Court order a transfer of this case to Mississippi."

In another affidavit which was filed on August 11, 1960 he states:

"2. As a result of the economic peril point Plaintiff is in, it has to guard closely every dollar spent in this litigation.

3. As soon as the case is at issue, there will be examinations of Plaintiff. Its books and records and auditors are in Mississippi and it will be much more convenient and less expensive for Plaintiff to handle those examinations there than here.

4. Plaintiff's financial picture is such that a move from Tennessee to Mississippi is imperative in order to conduct this litigation at a minimum of expense.

5. Recently, due to circumstances not involved in this case a firm of certified public accountants located in Jackson, Mississippi, commenced an audit of Plaintiff's books. Details concerning this audit will be available in Jackson, Mississippi.

6. The expenses of the litigation have been such that, to date, Plaintiff has been unable to reimburse its counsel fully for all their necessary out of pocket expenses. The Plaintiff's general counsel and the officers and employees of Plaintiff are in the Southern District of

Mississippi. It will materially reduce Plaintiff's expense if the litigation can be conducted there.

7. Since this action began Plaintiff's financial situation has become more serious so that it is essential that every penny be saved.

8. In fact, Plaintiff's cash resources are at such a low ebb, that if this case remains in Knoxville it is doubtful that Plaintiff can raise the funds needed to produce its witnesses for the trial. Certainly Plaintiff should be allowed to try its case in a District where the Trial Judge can see and hear its witnesses. It should not be forced to use depositions when unable to pay the expenses of needed witnesses.

9. Insofar Defendants are concerned, being large national corporations, Mississippi is as convenient a forum as Tennessee, if not more so.

10. Remaining in Tennessee is such a financial hardship on Plaintiff, and of such inconsequence to Defendants, the Court should grant Plaintiff's motion to change the venue in the interests of justice, for the convenience of parties and witnesses."

The obvious conclusion to be drawn from this affidavit and the other one hereinafter mentioned is that plaintiff's financial plight may prevent it from continuing the case in this Court if the motion to transfer is denied.

The defendants do not seriously dispute plaintiff's serious financial condition of which Mr. Ford speaks. They contend that the statements in the affidavits are too general in that they fail to give the names and number of witnesses and fail to state the substance of their testimony. Some of the courts have held that movant must supply such information in supporting affidavits in order to justify a removal

order. In response to these contentions, Mr. Ford filed another affidavit on September 19, 1960 in which he names seven witnesses who live in Mississippi that he expects to use at the trial. The pertinent part of this affidavit is as follows:

> "2. As previously stated Plaintiff finds it a financial hardship to continue to litigate this case at Knoxville. As trial approaches, Plaintiff fears it will be unable to finance the expenses of its many Mississippi witnesses at Knoxville. Among the many witnesses in Mississippi upon whose testimony Plaintiff will rely are the following:
>
> 1. A. N. Morgan
> Jackson, Mississippi
> 2. Don McWilliam
> Meridian, Mississippi
> 3. J. B. Stokes—Director
> Meridian, Mississippi
> 4. Malcolm R. Graham—New President
> Meridian, Mississippi
> 5. W. P. Bridges, Jr.—Director
> Jackson, Mississippi
> 6. Robert Singleton
> Jackson, Mississippi
> 7. Bob Rutledge
> Meridian, Mississippi"

Some of the defendants assert that because of the greater distance from Chicago, Cincinnati, New York, Washington and Philadelphia, these places being the home offices of some of the defendants, to Meridian, Mississippi that it would work an inconvenience to them to transfer the case to Mississippi. It is said that the increase of distance would

increase the transportation costs and man-hour costs of witnesses and counsel.

Experience with protracted cases of this character establishes that the greater part of discovery work is done at the principal offices of the accused defendants where the books and other records are located. If proper discovery is done each party knows in advance of trial all of the exhibits that are to be filed. It is the policy of this Court to require counsel to exchange exhibits and file them with the Clerk, excepting those which are to be used for impeachment, in advance of the trial. The witnesses are usually flown from their home to the place of trial to testify and after so testifying return home immediately. Whatever additional man-hours are required for the trial at Mississippi because of the distance factor would be small as compared with the man-hours spent in preparation for trial, the greater part of which, from the standpoint of the defendants, will be spent at places outside of Mississippi and Tennessee. The extra travel costs for the defendants to the place of trial in Mississippi would also be small as compared with the overall costs incurred if preparation for trial and for other matters necessary in the trial itself. Whatever inconvenience that may be caused to defendants because of the distance factor would not outweigh the injustice that would result to plaintiff should the case be tried in Knoxville. As previously indicated, the record shows that plaintiff may be deprived of an opportunity for a trial if the case is not transferred to Mississippi.

Some of the defendants say that plaintiff waited too long to move for a transfer; that it waited approximately six months after filing the suit and two months after the Court raised the point. The suit was filed February 4, 1960. The amended complaint was filed March 21, 1960. On May 26, 1960, an order was issued by the Court calling for a general conference with counsel. This order provided that:

"The general procedure for the conference is as follows:

1. To consider the transfer of the case to the Eastern Division of the United States District Court for the Southern District, plaintiff being a Mississippi corporation and doing business in Meridian, County of Lauderdale, State of Mississippi."

Item No. 5 of this order stayed all discovery procedure until the issues were joined. The conference was postponed from time to time at the instance of one party or another. In the meantime, numerous motions were filed by the defendants raising what are commonly referred to as "fringe issues" and various orders were issued by the Court extending time for them to file supporting briefs.

The delay in holding the conference to consider, among other things, the question of transfer was caused by the parties themselves. For this reason, they are not in a position to complain of plaintiff's waiting some six months to file the motion to transfer. Since discovery was stayed, the defendants were not injured by the delay. Moreover, since postponement of consideration of the question of transfer was delayed at the instance of the parties themselves, they should not get an advantage from such postponement.

Defendants say that if the case is moved to Mississippi that this will cause duplication of work and the employment of local counsel in Mississippi. What has been said in the discussion of the point next above mentioned applies equally to this question. Since discovery was stayed at the threshold of the litigation, and since counsel now employed have been largely concerned with fringe questions, the extra expense to be incurred by the defendants in employing Mississippi local counsel will, in the opinion of this Court, be negligible.

The fact must not be overlooked that this is an anti-trust case which is controlled in the main by the anti-trust laws as distinguished from local laws.

The Court is of the opinion and finds that plaintiff's financial condition is such as it will probably be unable to pay the expenses of its willing witnesses to appear in person in Knoxville and to finance otherwise the expense of a trial in Knoxville. It is further of the opinion that, in the interest of justice, plaintiff's motion to transfer should be sustained and the case transferred from Knoxville to Meridian, Mississippi.

Although the application requests a transfer to the United States District Court for the Southern District of Mississippi, Jackson Division, all of the parties seem to agree that Meridian would be a much more convenient place for the defendants than Jackson. Some of the defendants requested at the hearing that the transfer be made to Meridian rather than Jackson in the event a transfer order were entered to which the attorneys for plaintiff agreed.

In summary the Court holds:

(1) That Section 1404(a) is available to plaintiff.

(2) That the suit could have been brought against all of the corporate defendants in Mississippi.

(3) That it is in the interest of justice for the case to be transferred from this Court to the Federal Court at Meridian, Mississippi.

Accordingly, an order has been passed to the Clerk transferring the case to Meridian, Mississippi.

/s/ ROBERT TAYLOR
United States District Judge

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MISCELLANEOUS:

Moores' Federal Practice, 2d edition, volume 6, ¶ 54.12[1] 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 933

THE PHILIP CAREY MANUFACTURING COMPANY, LLOYD A. FRY ROOFING COMPANY, AND THE RUBEROID CO., *Petitioners*,

v.

HONORABLE ROBERT L. TAYLOR, Judge of the United States District Court, Eastern District of Tennessee, Northern Division, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

To The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

CITATION TO OPINION BELOW

The Opinion of the Court of Appeals is reported at 286 F. 2d 782, and is printed in the Petition for Writ of Certiorari at page A-1.

JURISDICTION

Jurisdiction is fully covered in the Petition for Certiorari and the statement there made is adopted here by reference.

QUESTIONS PRESENTED FOR REVIEW

It is respectfully submitted that the record does not sustain the questions presented for review in the Petition for Certiorari and that the questions presented are as follows:

1. Whether 13 corporate defendants properly served and appearing in the transferor court and who could have been properly sued in the transferee court can object to a transfer under 28 U.S.C. § 1404(a) on the ground that other named, but unserved non-appearing and dispensable defendants, who were outside the personal jurisdiction of the transferor court, would not be subject to suit in the transferee court?

2. When an action involving 13 *served* and *appearing* corporate defendants and 73 individual defendants who were outside the personal jurisdiction of the court, is ordered transferred under § 1404(a) of Title 28, U.S.C., whether an objection to the transfer by three corporate defendants because the 73 individual defendants could not be sued on the transferee court is rendered moot by an order of the transferor court dismissing the suit as to the 73 individuals?

STATUTES INVOLVED

In accordance with Rule 40.3 of the Supreme Court Rules the respondent accepts the statutes involved as set forth in the Petition for Certiorari and adds thereto the following:

Clayton Act, § 12, 15 U.S.C. § 22, 38 Stat. 736:

"Sec. 12. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

STATEMENT OF THE CASE

The statement of the case in the Petition for Certiorari should point out that the Amended Complaint was filed on March 21, 1960.

It should be pointed out that the question as to whether defendant Asphalt Roofing Industry Bureau was subject to suit in Mississippi was set for hearing before Judge Taylor on October 12, 1960, but on October 4th the plaintiff filed a notice of dismissal as to that defendant pursuant to Rule 41(a)(1)(i), of the Federal Rules of Civil Procedure.

It should be pointed out that subsequent to filing the Petition in the Circuit Court on November 25, 1960, plaintiff served notice of dismissal of all individual defendants in accordance with Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure.

It should also be pointed out that on March 1, 1961, the defendant Asphalt Roofing Industry Bureau and all individual defendants were dismissed by order of Judge Taylor in accordance with Rule 21 of the Federal Rules of Civil Procedure.

REASONS WHY WRIT SHOULD NOT BE GRANTED

A. THERE IS NO SUBSTANTIAL QUESTION PRESENTED FOR REVIEW

It is well stated by Mr. Justice Reed in *Ruhlin* v. *New York L. Ins. Co.*, 304 U.S. 202 at page 206, that the purpose of the grant of jurisdiction to bring up cases by certiorari from Circuit Courts was to secure uniformity of decisions and to bring up to the Supreme Court cases of importance which were in the public interest to be decided by the forum of last resort.

The instant case is neither of peculiar gravity and general importance or necessary to secure uniformity of decision, nor does it conflict with a prior decision of this Court or of any United States Court of Appeals.

1. The Decision Below Does Not Conflict With Any Prior United States Supreme Court Decision

At pages 5-8 of the Petition for Certiorari it is contended that the decision of the Sixth Circuit Court of Appeals is in direct conflict with the decision of the Supreme Court in *Hoffman* v. *Blaski*, 363 U.S. 335.

The *Blaski* decision dealt with a strikingly different factual pattern and legal issue. There plaintiffs had brought an action for patent infringement properly against all defendants in the *only* judicial district where the action could have been brought. The defendants *properly* before the court sought, by *unanimous* action over plaintiffs' objections, to transfer the case to another federal court under the provision of 28 U.S.C. § 1404(a). This Court held that the defendants could not waive objections to venue in the transferee court and thereby conform to the requirements of § 1404(a). Thus, the defendants could not by their own consent

confer jurisdiction on the transferee court and force plaintiffs to try their action in a transferee district where plaintiffs could not have originally brought the action.

The Court of Appeals for the Sixth Circuit properly determined that the opinion in the *Blaski* case did not decide the issue presented in the case at bar. *Philip Carey Manufacturing Company* v. *Taylor*, 286 F. 2d 782, 783 (6th Cir. 1961).

In the instant case the individual defendants had not properly been sued in the transferor court. They were never before the court at any time. They could not be brought before the transferee court.

It is undisputed that *all* the corporate defendants transferred *were properly* before the court in Tennessee and could have been properly sued in Mississippi. Only three of the twelve corporate defendants are presenting an objection.

The mere fact ". . . that their [73 individual defendants] names were listed as defendants on the Complaint gave them no status as parties which should bar a transfer action.". *Philip Carey Manufacturing Company* v. *Taylor*, *supra*, at page 785. For all practical purposes, the individual defendants were "mere straw men" in the case. *General Accident Fire & Life Assurance Corp.* v. *Kirkland*, 338 S.W. 2d 549, 550 (Supreme Court of Tennessee, September 9, 1960).

The corporate defendants are in effect attempting to raise an objection which only the individual defendants could properly make. The individual defendants have never made any objection because they were not before the transferor court nor are they before this

Court. Indeed, it cannot be disputed that these individual defendants are no longer in this case since dismissals as to them have been entered. The corporate defendants who are subject to the transfer cannot take advantage of such a narrow construction to defeat the purpose of the transfer statute.

The three corporate defendants also are subject to a long established general rule that objection to venue is a personal objection and one defendant cannot object because the venue is improper as to another defendant. *Camp* v. *Gress*, 250 U.S. 308.

2. The Decision Below Does Not Involve a Legal Principle on Which the Circuit Courts of Appeals Are in Conflict

At pages 9-11 of the Petition for Certiorari it is contended that the decision complained of is in conflict in principle with the decisions of other Courts of Appeals as to the power of a District Court to transfer an action where such court lacks personal jurisdiction over all parties. (An analysis of the conflicting views is presented in *Hohensee* v. *News Syndicate, Inc.*, 286 F. 2d 527, 529 (3rd Cir. 1961) cited on pages 9 and 10 of the Petition for Certiorari.) The four Circuit Court decisions cited by petitioner on pages 9 and 10 of the Petition all involve the issue of whether absent personal jurisdiction *a defendant* or *defendants* may be transferred to a transferee court *where personal jurisdiction may be obtained*. The mould of the facts producing such an issue is sharply presented in the case of *Goldlawr, Inc.* v. *Shubert*, 175 F. Supp. 793 (S.D. N.Y. 1959), cited by petitioner on page 10 of the Petition. There, multiple defendants were sued in Pennsylvania. As to some of these defendants, the Pennsylvania court lacked *personal jurisdiction*. On motion

of plaintiff, transfer was granted to the Southern District of New York where personal service could be obtained. The District Court adopted the view that transfer was not authorized as to these defendants because personal jurisdiction in the transferor court was lacking. The District Court rejected the alternative of remanding the case to the transferor court since that court had determined it lacked personal jurisdiction and such remand would serve no useful purpose. The propriety of such action was affirmed by the Circuit Court of Appeals for the Second Circuit. Judge Hincks dissenting in part: *Goldlawr, Inc.* v. *Heiman*, F.2d , CCH 1961 Trade Cases ¶69,951 (2nd Cir. Feb. 21, 1961).

Obviously, the conflicting views concerning a transfer of a defendant not properly before the transferor court to a district where personal service may be obtained is not involved here.

There is no contention, nor has there *ever been* any contention that the individual defendants could be sued in Mississippi. Indeed, in the affidavit of counsel supporting the motion to transfer *no mention* was made of the *individual* defendants. (Pages 67 and 68 of Certified Transcript of Proceedings on Petition for Writ of Certiorari) Quite the contrary, in a supplemental affidavit supporting transfer the following statement was made:

> "Insofar [as] *Defendants* are concerned, *being large corporations*, Mississippi is as convenient a forum as Tennessee, if not more so." [Emphasis supplied.] Pages 70 and 71 of Certified Transcript of Proceedings on Petition for Writ of Certiorari.

B. ANY POSSIBLE REVIEWABLE ISSUE INVOLVED IN THE DECISION BELOW HAS BECOME MOOT

An abstract or moot question will not be reviewed by the Supreme Court, *Regal Knitwear Co.* v. *National Labor Relations Board*, 324 U.S. 9, 15. Further, the Supreme Court will not ordinarily make any determination concerning the rights or liabilities of persons not made parties to the certiorari proceeding, *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 89. And where by an act of the parties or a change in law "... the existing controversy has come to an end, the case becomes moot and should be treated accordingly." *United States* v. *Alaska Steamship Co.*, 253 U.S. 113, 116.

As respondent pointed out in his brief before the Circuit Court the transfer order was not intended in any way to affect the rights of the 73 unserved defendants. "Under the antitrust statute (Section 22 of Title 15) only corporations can be served outside the state and to date not one of the individual defendants has voluntarily appeared, so that the effect, if any, of the transfer order upon any of them at this stage is strictly of theoretical and academic interest."

In an attempt to avoid any argument about such a hypothetical and trivial point, plaintiff filed on November 25, 1960, in the United States District Court for the Eastern District of Tennessee a discontinuance of the action against all the 73 named but unserved defendants.

The Sixth Circuit was of the opinion that the individual defendants were not properly dismissed under the provisions of Rule 41(a)(1)(i) of Federal Rules of Civil Procedure 28 U.S.C. and such dismissal should properly be accomplished under the provisions of Rule

21, Federal Rules of Civil Procedure. *Philip Carey Manufacturing Company* v. *Taylor, supra*, at page 785.

On February 29, 1961, the respondent entered an order in accordance with the provisions of Rule 21 dismissing the 73 individually named defendants and the Asphalt Roofing Industry Bureau. This act was not prohibited by the order of the Circuit Court of February 16, 1961 (set forth in Petition, Appendix page A-9) obtained by petitioner which simply prevented respondent from transferring the case to Mississippi. As Judge Hand pointed out in *Littman* v. *Bache & Co.*, 246 F. 2d 490, 492 (2nd Cir. 1957), an order to transfer does not *ipso facto* effect a transfer and that such interlocutory order is obviously not final. See also Moores' Federal Practice, 2d edition, volume 6, ¶54.12[1] at pages 115 and 116:

> "Similarly, an order is interlocutory that transfers an action to a proper venue, either under § 1406(a) . . . or under § 1404(a). . . . [B]ut in proper cases these interlocutory orders relative to transfer may be reviewed by mandamus and or prohibition . . . ."

The transfer order may now be considered to have been amended in effect to eliminate explicitly the 73 unserved defendants.

Clearly any possible argument based upon the effect of the transfer order on the 73 unserved defendants has been settled conclusively.

CONCLUSION

The frangible qualities of petitioners' arguments are distinct. The have failed to show any of the accepted grounds for granting certiorari. Accordingly, their petition for certiorari should be denied.

Respectfully submitted,

PEYTON FORD
Attorney for Respondent

Of Counsel:

FORD, LARSON, GREENE AND HORAN
ARTHUR JOHN KEEFFE

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION AT KNOXVILLE

Civil Action No. 4012

LEOPARD ROOFING COMPANY, INC., *Plaintiff*

v.

ASPHALT ROOFING INDUSTRY BUREAU, ET AL., *Defendants*

Notice of Dismissal as to the Defendant, Asphalt Roofing Industrial Bureau

Comes the plaintiff, Leopard Roofing Company, and hereby gives notice of its voluntary dismissal of this action as to the defendant, Asphalt Roofing Industry Bureau, no answer or motion for summary judgment having been filed by said defendant. This dismissal is without prejudice to the rights of the plaintiff to refile this action as to said defendant.

This 4th day of October, 1960.

LEOPARD ROOFING COMPANY, INC.

By: WILL WILSON
Attorney

Notice of Dismissal as to the Individual Defendants

Comes plaintiff, Leopard Roofing Company, and it appearing that the following individual defendants have not been served with process, hereby gives notice of its voluntary dismissal of this action as to the following defendants:

Lloyd A. Fry, Sr., Lloyd A. Fry, Jr., William H. Barthel, Joseph Fisher, Harold C. Adsit and L. W. Woodward;

E. J. O'Leary, Herbert Abraham, Stanley Woodward, E. M. Railton, F. E. Byrnes, Fred Sweeney, H. S. Roberts, John Taylor Meredith and J. E. Hall;

Rawson G. Lizars, Malcolm Meyer, J. R. Johnson, F. R. Weddington, Dan Le Bow, A. O. Graves and J. L. Strickland;

A. R. Fisher, C. B. Burnett, Roger Hackney, W. R. Wilkinson, H. M. Ball and J. L. Wood;

I. J. Harvey, Jr., G. J. Pecaro, D. J. Mc Namara, H. L. Evans, A. O. Eaton and J. A. Main;

R. S. King, J. W. Humphrey, H. R Barrett, E. C. Faulkner, C. E. Howard, E. J. Fasold and E. F. Ziegenhardt;

Kerby A. Fisk, Glenn B. Miller, Carleton Bates, George A. Bennington, L. A. Coleman and Richard F. Hansen;

C. S. Bird, H. H. Anderson, W. C. Ahlgren and R. A. Wilkins;

Fowler B. McConnell, Charles H. Kellstadt, R. E. Brookes, Edward Gudeman, Austin T. Cushman, Crowdus Baker, Arthur M. Wood and Donald Mac Arthur;

C. H. Shaver, O. M. Knode, H. F. Sadler, R. D. Stephen, C. F. Axelson and F. L. Stellner;

O. S. Mansell, H. W. Collins, C. L. Christenson, F. A. Irvine, W. D. Becker, C. W. Johns and Richard Thompson, Jr.;

A. R. Fisher, C. B. Burnett, Roger Hackney, W. R. Wilkinson, Herbert Morton Ball and J. L. Wood.

This 25th day of November, 1960.

LEOPARD ROOFING COMPANY, INC.

By: WILL WILSON
Attorney

Order Dismissing Certain Named Defendants

And now, to-wit this 1st day of March, 1961, upon motion of the plaintiff to dismiss the action, without prejudice to plaintiff, against the following named defendants:

Asphalt Roofing Industry Bureau, J. S. Bryant, Lloyd A. Fry, Sr., Lloyd A. Fry, Jr., William H. Barthel, Joseph Fisher, Harold C. Adsit, L. W. Woodward, E. J. O'Leary, Herbert Abraham, Stanley Woodward, E. M. Railton, F. E. Byrnes, Fred Sweeney, H. S. Roberts, John Taylor Meredith, J. E. Hall, Rawson G. Lizars, Malcolm Meyer, J. R. Johnson, F. R. Weddington, Dan Le Bow, A. O. Graves, J. L. Strickland, A. R. Fisher, C. B. Burnett, Roger Hackney, W. R. Wilkinson, H. M. Ball, J. L. Wood, I. J. Harvey, Jr., G. J. Pecaro, D. J. Mc Namara, H. L. Evans, A. O. Eaton, J. A. Main, R. S. King, J. W. Humphrey, H. R. Barrett, E. C. Faulkner, C. E. Howard, E. J. Fasold, E. F. Ziegenhardt, Kerby A. Fisk, Glenn B. Miller, Carleton Bates, George A. Bennington, L. A. Coleman, Richard F. Hansen, C. S. Bird, H. H. Anderson, W. C. Ahlgren, R. A. Wilkins, Fowler B. Mc Connell, Charles H. Kellstadt, R. E. Brookes, Edward Gudeman, Austin T. Cushman, Crowdus Baker, Arthur M. Wood, Donald Mac Arthur, C. H. Shaver, O. M. Knode, H. F. Sadler, R. D. Stephen, C. F. Axelson, F. L. Stellner, O. S. Mansell, H. W. Collins, C. L. Christenson, F. A. Irvine, W. D. Becker, C. W. Johns, Richard Thompson, Jr., A. R. Fisher, C. B. Burnett, Roger Hackney, W. R. Wilkinson, Herbert Morton Ball, J. L. Wood, and it appearing to the Court that none of the above-named defendants have been served with process and none are indispensable parties; the enumerated defendants are hereby dismissed, without prejudice to the plaintiff, from the above-captioned action.

It is so ordered.

ROBERT L. TAYLOR
Judge, United States District Court,
Eastern District of Tennessee,
Northern Division